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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE
10 NORTHERN MARIANA ISLANDS

11 GUIHUA BAI,

12 Plaintiff,

13 -vs-

14 GINTIAN CORPORATION, dba "LIGHT
15 MASSAGE, ZHONG LI and "Mr. ZHU":

16 Defendants

CIVIL ACTION NO. 07-0016

17
18 OPPOSITION TO DEFENDANTS'
19 MOTION TO DISMISS AND FOR PARTIAL
20 SUMMARY JUDGMENT

21 COMES NOW, Plaintiff, Guihua Bai, by and through her attorney, Stephen J. Nutting, to
22 oppose defendants' motion to dismiss the plaintiff's First Amended Complaint (FAC) pursuant to
23 Rule 12(b)(6) of the Federal Rules of Civil Procedure and for partial summary judgment.
24 Defendants seek a dismissal of a FLSA minimum wage claim which does not exist within the
25 complaint; partial summary judgment on claims brought under the Commonwealth's Minimum
26 Wage and Maximum Hours law ("MWMH") and summary judgment for defendant Zhong Li on
27 another non-existent FLSA retaliation claim. Contrary to defendants' assertions, the FAC does not
28 bring on a claim for unpaid minimum wages due under the FLSA. The complaint does, however,

1 state a claim for unpaid minimum wages due under the Commonwealth's MWMH Act, (§ 33) and
2 for unpaid overtime due under the FLSA (§34) under Count I. Defendants committed these violations
3 by instituting an ill-conceived and illegal commission scheme, instead of paying an hourly wage as
4 required under the employment contract and by law. (§§ 21 and 22).

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7 Similarly, plaintiff's complaint does not state a claim for "FLSA retaliation" under Count II.
8 Instead, a claim is made for constructive termination, to recover the wages and overtime which
9 would have been earned by the plaintiff, but for the defendant's imposition of intolerable and
10 oppressive working conditions which forced the plaintiff to leave the employ of her employer. This
11 Court has federal question jurisdiction over plaintiff's overtime claims brought under the FLSA and
12 supplemental jurisdiction over those claims brought under the MWMH Act and the contract.
13 Moreover, all of plaintiff's claims are sufficiently stated and alleged to place the defendants on
14 notice of those claims and to survive defendants' motions.
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18 I. NOTICE PLEADING AND RULE 12(b)(6)
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20 On a Rule 12(b)(6) motion, a court must construe the complaint in the light most favorable to
21 the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the pleader.
22 *Rosborough Mfg. Co. v. Trimble*, 301 F.3d 482, 489 (6th Cir.2002). Working in conjunction with
23 Rule 12(b)(6) is Fed. R. Civ. P. 8(a) which requires a plaintiff's complaint to contain a "short and
24 plain statement" of the claim and the basis for jurisdiction, and subsection (f) of which instructs the
25 courts that "[a]ll pleadings shall be so construed as to do substantial justice." Rule 8(a) thus requires
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1 only a "short and plain statement" of the claim that will give the defendant fair notice of what the
2 plaintiff's claim is and the grounds upon which it rests. *Cler v. Illinois Educ. Ass'n* 423 F.3d 726, 729
3 -730 (7th Cir. 2005).
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6 In this regard, the Supreme Court has cautioned that "[t]he Federal Rules reject the approach
7 that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and
8 accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."
9 *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *see also Lockett v. Rent-A-*
10 *Center, Inc.*, 53 F.3d 871, 873 (7th Cir.1995) ("District judges must heed the message of Rule 8: the
11 pleading stage is not the occasion for technicalities."). A court may dismiss a complaint for failure
12 to state a claim only if it is clear that no relief could be granted under any set of facts that could be
13 proven consistent with the allegations in the complaint. *See Hishon v. King & Spalding*, 467 U.S.
14 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *see also Wright v. Newsome*, 795 F.2d 964, 967 (11th
15 Cir.1986) ("[W]e may not ... [dismiss] unless it appears beyond doubt that the plaintiff can prove no
16 set of facts in support of the claims in the complaint that would entitle him or her to relief.") (citation
17 omitted). Thus, the threshold is "exceedingly low" for a complaint to survive a motion to dismiss for
18 failure to state a claim. *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir.1985).
19 "The test for reviewing a 12(b)(6) motion is whether under any reasonable reading of the pleadings,
20 plaintiff may be entitled to relief." *Simon v. Cebrick*, 53 F.3d 17, 19 (3d Cir.1995).
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26 Plaintiff's complaint is sufficient to put all of the defendants on notice of the substance of the
27 complaint and each of the causes of action raised therein.
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1 II. PLAINTIFF MAKES NO CLAIM FOR MINIMUM WAGES DUE UNDER THE FLSA

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3 Under Count I of plaintiff's complaint, plaintiff seeks damages for unpaid wages and overtime
4 due for the hours she worked as an employee of the defendant. Plaintiff makes clear that defendants
5 failed to pay the hourly wages which were due under the employment contract she had with her
6 employer and as required by law, instead choosing to limit plaintiff's pay pursuant to an unlawful
7 commission scheme.(See ¶¶ 19, 20, 21 and 22). As a result of the defendants' payroll scheme,
8 plaintiff alleges in Paragraph 33: "Employer failed to pay minimum wage for actual hours worked
9 for the first forty (40) hours worked in each work week in violation of the CNMI's Minimum Wage
10 and Hour Act at 4 CMC § 9211 et.seq.." No claim is made for minimum wages due under the FLSA
11 anywhere in the complaint. The claim for minimum wages due for the first 40 hours of work is
12 clearly brought under the Commonwealth's MWMH Act and the Court has supplemental jurisdiction
13 over this claim pursuant to 28 U.S.C. 1367 as a result of the plaintiff's claim for violations of the
14 FLSA.
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17 Plaintiff suggests that the allegations contained in ¶ 37 and in the prayer for Relief at ¶ 1
18 include a request to recover minimum wage violations under the FLSA (see Motion p.4) relying on
19 the case of *Abellanosa v. L&T International*, CV No. 05-0010, Order Granting Summary Judgment
20 (D.N.M.I. Oct. 12, 2006). The language of ¶¶ 37 and 1, however, do not reflect a claim for minimum
21 wages due under the FLSA. Both of these paragraphs lay claim for "unpaid wages and overtime
22 compensation . . . due under the contract and pursuant to the CNMI's Minimum Wage and Hour Act
23 and for overtime pay under the Fair Labor Standards Act (FLSA)." (FAC ¶ 37 and prayer for relief
24 ¶ 1).
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1 The facts and ultimate holding of *Abellanos* has little or no application to the case at hand.
2 The plaintiffs in *Abellanos* claimed that the failure of the employer to pay certain expenses related
3 to the renewal of their employment effectively denied the payment of minimum wages due.¹ The
4 *Abellanos* plaintiffs were unable to show, however, that these illegal or excessive deductions
5 impacted the payment of overtime under the FLSA. As a result, there was no federal question which
6 the Court had jurisdiction to resolve.
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10 In the instant case, however, the plaintiff's complaint is not limited to illegal deductions which
11 affected the payment of minimum wage.² Indeed, the true gravamen of plaintiff's complaint
12 involves the illegal commission scheme which not only allowed the employer to avoid the payment
13 of the minimum wage due for the first forty (40) hours, but the payment of overtime which was due
14 for the 30-65 hours of overtime the plaintiff was required to work throughout her employment with
15 defendants. (See ¶¶ 24 and 25). This Court clearly has federal question jurisdiction over plaintiff's
16 FLSA claims for unpaid overtime, and supplemental jurisdiction over her complaint for unpaid
17 straight time wages, all of which occurred as a result of the defendants institution of an unlawful
18 commission scheme for the payment of wages.
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22 ¹ The plaintiffs in *Abellanos* claimed that because they were required to pay for their medical exams
23 and health certificates and because the employer did not reimburse them for these expenses or pay them for the
24 time they spent getting their exams and obtaining the certificates, plaintiffs were effectively denied payment of
25 minimum wage.

26 ² Plaintiff has a claim for illegal deductions in that the defendants withheld the payment of \$4,000 for
27 the costs of bringing her to Saipan for employment under ¶ 18 and for deductions for costs of electricity, water,
28 and taxes for wages not actually paid under ¶ 28. These deductions, especially the \$4,000 deduction, not only
impacted the payment of minimum wage, but directly resulted in the failed payment of overtime. Moreover,
unlike *Abellanos*, the plaintiff's claims in the instant case are not limited to these unlawful deductions, but
include and are more directly related to the unlawful commission scheme the defendants initiated in violation
of the Commonwealth's MWMH Act and the FLSA.

1 III. PLAINTIFF MAKES NO CLAIM FOR FLSA RETALIATION

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3 Defendant Zhong Li seeks summary judgment on a supposed FLSA retaliation claim which
4 does not exist anywhere within the complaint. Defendants state that "Plaintiffs second claim for
5 relief appears to allege a claim for retaliation under the FLSA." Plaintiff, however, makes no claim
6 for FLSA retaliation under Count II. Instead, as the title of the cause clearly states, plaintiff seeks
7 damages for wages and overtime lost as a result of her "constructive termination" from employment
8 before the end of the contract. Under Count II of the complaint, plaintiff alleges:
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11 The employer's actions in making unlawful deductions, and forcing the employees to
12 work intolerably long hours without any overtime pay, and in making veiled threats to
13 the employees not to cause trouble for the company, created intolerable and oppressive
14 working conditions such that Bai could no longer continue to work for employer and she
was constructively terminated from employment.

15 FAC ¶ 43.

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17 Plaintiff does not contend that defendant Zhong Li, or the other defendants retaliated against
18 her for contemplating the instant action or for complaining of the non-payment of overtime. Plaintiff
19 alleges that the working conditions were oppressive and hostile, such that she felt she could no
20 longer continue in her employment. As a result, plaintiff's contract of employment was
21 constructively terminated and as a further result of that constructive termination, plaintiff seeks to
22 recover damages for wages and overtime she would have earned over the course of the remaining
23 term of her employment contract based upon the hours she worked prior to her constructive
24 termination.
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1 Plaintiff simply has not asserted a cause of action for FLSA retaliation. Defendant Zhong Li
2 is therefore not entitled to summary judgment on a cause of action which is not plead.
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4 IV. THE DEFENDANTS ARE NOT ENTITLED TO PARTIAL SUMMARY JUDGMENT ON
5 THE COMMONWEALTH MWMH ACT CLAIMS
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7 Defendants claim that they are entitled to partial summary judgment on the claims brought
8 under the Commonwealth's MWMH act claiming that any wages which were unpaid more than six
9 months prior to the filing of the amended complaint³ are time barred as a result of a six month statute
10 of limitations set forth at 4 CMC § 9246. The Defendants motion for partial summary judgment here
11 is not well taken for a number of reasons. First and foremost, the statute of limitations for claims
12 brought under the MWMH act is actually one year for any willful violation of the Act and not limited
13 to six months as the defendants claim. In the instant action, plaintiff complains that the defendants
14 failed to pay hourly wages due and instead imposed a wage scale based solely upon a commission
15 for the number of massages performed. The imposition of the unlawful payment scheme was not
16 negligent, and was certainly a knowing and willful violation of the employment contract and of the
17 law. Obviously the employer, as a signatory to the employment contract, knew of the obligation to
18 pay an hourly wage, and yet willfully chose another method to compensate the plaintiff for her work.
19 Obviously, the one year statute of limitations applies and not six months as the defendants suggest.
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25 ³ Defendant claims that the plaintiff's complaint are time barred if more than six (6) months before the
26 filing of the *amended* complaint. Under Rule (15)(c)(2) of the Federal Rules of Civil Procedure, however, the
27 date of an amended complaint relates back to the filing of the original complaint if "the claim or defense asserted
28 in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth
in the original pleading." In the instant case identical claims are raised in the FAC as were originally alleged as
they relate to unpaid wages and overtime.

1 Additionally, even if the claims for minimum wage brought under the MWMH act may be
 2 subject to a one year statute of limitation under the Act, plaintiff may alternatively seek the payment
 3 of wages due under the contract. ⁴ In the CNMI a claim brought for breach of contract is subject to
 4 a six year statute of limitations. (See 7 CMC §2505 and *Apatang v. Marianas Public Land Corp.*
 5 1 N.M.I. 140 (1989). Thus, even if the plaintiff's claims for unpaid minimum wage is limited to a
 6 period of one year under the MWMH, she may still assert that claim as a breach of her employment
 7 contract and would not be subject to the one year restriction.⁵ Therefore, Defendants are not entitled
 8 to summary judgment limiting the plaintiffs' complaint for unpaid minimum wages for a period of
 9 six months immediately preceding the filing of the complaint.
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12 CONCLUSION

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 14 For all the foregoing reasons, defendants motion to dismiss the complaint or for summary
 15 judgment and partial summary judgment must be denied.
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 19 ⁴ It is not necessary within the complaint to define whether the complaint for the payment of straight
 20 time wages arises under the MWMH Act, or under the contract. "Consistently with their obligation to construe
 21 plaintiffs' allegations liberally, courts will not dismiss a complaint for failure to state a claim merely because the
 22 complaint requests inappropriate relief, or because it miscategorizes legal theories." 2 JAMES WM. MOORE
 23 ET.AL., MOORE'S FEDERAL PRACTICE §12.34(1)(b). In fact, Rule 8(a)(2) does not require a claimant to set forth
 24 any legal theory justifying the relief sought on the facts alleged. It only requires "sufficient factual averments
 25 to show that the claimant may be entitled to some relief. If a claim for relief does set forth a legal theory, any
 26 relief finally granted usually is not limited strictly to that theory." 2 JAMES WM. MOORE ET.AL., MOORE'S
 27 FEDERAL PRACTICE §8.04(3). The complaint need not specify the correct legal theory, nor point to the right
 28 statute to survive a 12(b)(6) motion, provided that "relief is possible under any set of facts that could be
 established consistent with the allegations." *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir.1992).

⁵ Thus, while plaintiff's complaint for damages under the MWMH Act as they relate to unpaid
 minimum wages might be limited to one year from the filing of the complaint, the claim for actual unpaid
 minimum wages can still be recovered for breach of contract. The only limitation which might be applicable
 under the MWMH ould relate to the recovery of liquidated damages for minimum wages that were unpaid more
 than one year prior to the filing of the original complaint.

Respectfully submitted this ____ day of June, 2007.

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/s/
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